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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 635

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JEFFERSON, COLORADO, ET AL., *Appellants*,

vs.

THE CITY AND COUNTY OF DENVER, COLORADO, ET AL., *Appellees*.

ON APPEAL FROM THE SUPREME COURT OF COLORADO

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellees, City and County of Denver, State of Colorado, et al., move to dismiss or affirm the appeal herein pursuant to Rule 16 of the Revised Rules of this Court, upon the ground that no substantial federal question is involved herein.

Questions Presented

1. Whether Denver is proscribed by the equal protection clause of the 14th Amendment to the United States Constitution from accepting a voluntary annexation petition from landowners of a tract of land in an adjoining county, Jefferson, under annexation provisions which have been upheld by the Colorado Supreme Court, without submitting the question to all of the qualified electors of Jefferson County for approval?

2. Whether federal constitutional questions not raised below may be raised for the first time in this Court?

Statement of the Case

The owners of a tract of land in Jefferson County, Colorado, contiguous to the City and County of Denver, have under the procedures specified in 1953 Colorado Revised Statutes,[1] applied to the legislative body of the City and County of Denver for annexation. Since Denver is, by Article XX of the Constitution of Colorado,[2] both a city and a county, this annexation involves a disconnection from Jefferson County, and a territorial attachment to the City and County of Denver. Denver passed an appropriate ordinance accepting the annexation. There are no creditors with vested or any rights who have objected. There are no bondholders or others relying upon the security of the affected property who have appeared or are adversely affected.

The objection comes only from the Board of County Commissioners of Jefferson County, Colorado, who in their official capacity and as individuals purportedly representing all the other citizens of the County, contend the attempted annexation is contrary to the equal protection provisions of the Fourteenth Amendment to the United States Constitution.

The proceeding began in the County Court of Jefferson County, where appellants contended the attempted annexation was contrary to various sections of the Colorado Constitution and various State statutes.[3] Therein they also

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[1] Chap. 139, Art. 11, §§ 1-9, See Jurisdictional Statement, Appendix C.

[2] See Jurisdictional Statement, Appendix B.

[3] Case Numbers 20021 and 19991, County Court, Jefferson County, Colorado. The cases were consolidated by the Supreme Court of Colorado. See Jurisdictional Statement, Appendix A, page 28.

contended their rights under Article 14, Section 1, of the United States Constitution were infringed.

No evidence was taken in the County Court since that Court granted a motion to dismiss. Under familiar procedural rules the facts alleged in the complaint had to be, and were, for the purposes of the motion, taken as true.

The County Court held as a matter of law that the complaint did not entitle appellants to relief. These objections were renewed in the Supreme Court of the State of Colorado and the same were therein struck down seriatim in a carefully prepared unanimous opinion. That Court's unanimous opinion rejected the contention that the annexation violated the Constitution of Colorado as well as the contention that it violated the equal protection clause of the Fourteenth Amendment. Finally, in their rehearing petition (which was denied without opinion) they contended to the Colorado Supreme Court that this Court's pronouncements in *Baker* v. *Carr*, 369 U.S. 186, had been ignored. In this Court they now expand their objections to include the due process clause[4] and claim hypothetically that the General Assembly, scheduled to convene in January 1963 might conceivably enact annexation legislation which would deprive them of equal protection of the laws guaranteed to them by the Fourteenth Amendment of the United States Constitution.[5]

Accordingly, there is now presented the corollary question of whether alleged constitutional issues raised for the first time in this Court may be brought forward for consideration at this time.

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[4] See id. at page 9, First Question, page 10, Second and Third Questions.

[5] See id. at page 14, Sixth Question.

ARGUMENT

No Substantial Federal Question Is Raised By This Appeal

1. *The Fourteenth Amendment Is Not Violated By The Provisions Of The Constitution Of Colorado Authorizing Annexation Of Property To Denver.*

The 1953 Colorado Revised Statutes [6] permit a contiguous area to be annexed by any municipality upon application to the municipality by the owners of more than 50% of the area, together with the consent of more than 50% of the landowners residing in the area. This annexation was thus initiated by the people who seek annexation, and not by Denver as appellants would have this Court believe. Accordingly, the City and County of Denver is not forcing an unwanted annexation on anyone. Denver's authority to accept an annexation petition, as a City, is given it by Article XX of the Constitution, adopted in 1902, and the area so annexed becomes a part of the City and County of Denver.

Article XIV, Section 3, of the Colorado Constitution, adopted in 1876, but made inapplicable by Article XX, Section 8, so far as Denver is concerned, does not permit a part of a county to be stricken off and added to an adjoining County without the question first being submitted to the qualified voters of the county from which the territory is proposed to be stricken off and unless a majority of the qualified voters of said county voting on the question vote therefor. Appellants claim this provision overrides Article XX adopted in 1902, and if it does not, then said Article XX is in violation of the due process and equal protection clauses, and discriminates in favor of Denver by

[6] Chap. 139, Art. 11, §§ 1-9.

permitting it to change the county locus of property without a vote of the people of the county affected.

That said Article XX does override Article XIV, Section 3, is settled not only by the express provisions of Section 8 of Article XX, but also by the Colorado Supreme Court's unanimous opinion herein. This construction of a state constitution is binding upon this Court.[7] There only remains for consideration the narrow issue of whether such a construction contravenes the due process or equal protection clauses of the Fourteenth Amendment of the Constitution of the United States and the Colorado Supreme Court rejected this contention also.

2. *Jefferson County, And Its Officials, Have No Fourteenth Amendment Rights They Can Maintain Against The State Of Colorado.*

The Complaint in this case is by the County of Jefferson, and its officials, against the exercise of political power by the State of Colorado, through its Constitution and a properly adopted statute, which clearly authorizes the annexation herein complained of. A review of the constitutional and statutory provisions involved, demonstrates that no violation of the Fourteenth Amendment is involved in the Annexation herein complained against.

In adopting Article XX the people of Colorado did not give the City and County of Denver any unilateral power to change property from one county to another. The amendment and the general statutes merely permit it to honor an annexation request.

The Supreme Court of Colorado has held that counties are merely subdivisions of the State and their powers are

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[7] *Jefferson Branch Bank* v. *Skelly*, 1 Black (U.S.) 436, 443; *Morehead* v. *New York* 298 U.S. 587, 609; *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64.

limited to those specifically granted by the State.[8] The rights exercised over the area within its boundaries by the county are political rights—also the power is a political power. Neither the county nor the inhabitants of the county possess vested property rights in the county system, in the county government, or in the county boundaries, nor a right to live in any particular county of the state. The right here is not a vested property right of a person against his government which is protected by the Constitution of the United States. A political right conferred by law upon a subdivision of the state is not a vested right against the government, which, in this case, because it involves the state Constitution, is the people themselves. The Court was fortified by a specific section of Article XX declaring all conflicting constitutional provisions to be inapplicable to Denver.[9] In so doing it adhered to its own pronouncements in *People ex rel Simon* v. *Anderson*, 112 Colo. 558, 151 P. 2d 972 (1944), and *People* v. *Cassiday*, 50 Colo. 503, 117 Pac. 357 (1911), appeal dismissed 223 U.S. 707.

The equal protection clause was not designed to insulate state instrumentalities, such as counties, from state action, and as counties they do not have privileges or immunities which they may invoke contrary to the will of their creator. "A municipal corporation, created by a state for better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Williams* v. *Baltimore*, 289 U.S. 36, 40; see also *Hunter* v. *Pittsburgh*, 207 U.S. 161. As this Court long ago held in *Laramie County* v. *Albany County*, 92 U.S. 307, 311, political subdivisions of a state cannot sustain their privileges or even their existence upon

[8] *Colburn* v. *Board of Commissioners of El Paso County*, 15 Colo. App. 90, 61 Pac. 241 (1900).

[9] See Jurisdictional Statement at 54.

the basis of any contract with the state. Nor do they have any contract rights with the state solely by reason of their relationship to it. *Gomillion* v. *Lightfoot*, 364 U.S. 339, 343. "'. . . [T]he Equal Protection Clause relates to equality between persons, as such, rather than between areas'" and "territorial uniformity is not a constitutional requisite." *McGowan* v. *Maryland*, 366 U.S. 420, 427. Nor do the appellants as individuals have any contract right to the continued maintenance of their county or its powers in unaltered form. *Hunter* v. *Pittsburgh*, *supra*.

That Denver is the only county exempted by Article XX from the voting requirements of Article XIV, Section 3 does not constitute a denial of equal protection. *Hayes* v. *Missouri*, 120 U.S. 68. The Colorado Supreme Court has consistently noted that such a classification is neither arbitrary nor unreasonable, and has adhered to that position again in this proceeding.

It has long been settled that a classification, even though discriminatory, is not arbitrary or violative of the Equal Protection Clause if any state of facts reasonably can be conceived that would sustain it. *Allied Stores* v. *Bowers*, 358 U.S. 522, 528.

The Colorado Supreme Court has for some sixty years considered that the people themselves had the right to set up a separate classification for Denver as a capitol city and as a growing population center by a separate constitutional provision. See *People* v. *Sours*, 31 Colo. 369, 74 Pac. 167 (1903). The record in this case wholly fails to support any claim that the classification so fixed infringes the equal protection clause.

Finally, appellants claim the annexation deprives them of property without due process of law, a point raised for the first time in this Court, thus raised too late. *White River Company* v. *Arkansas*, 279 U.S. 692, 699-700; *Hiawas-*

see River P. Co. v. Carolina-Tennessee P. Co.: 252 U.S. 341. The County Commissioners do not, in either their official or private capacities, own any part of the area seeking annexation, and hence they are not deprived of any property or other rights either with or without due process. *Hunter v. Pittsburgh, supra.*

In passing upon a similar problem the Supreme Court of Alaska in *Fairview Public Utility District v. City of Anchorage*, 368 P. 2d 540 (not yet officially reported) said at page 546:

> "Those who reside or own property in the area to be annexed have no vested right to insist that annexation take place only with their consent. The subject of expansion of municipal boundaries is legitimately the concern of the state as a whole, and not just the local community. There has been no infringement or deprivation of the rights protected by the Fourteenth Amendment."

An appeal from this decision was dismissed on October 8, 1962 by this Court. 83 S. Ct. 39.

3. *The Contention That A State Statute Has Preference Over The State Constitution Lacks Merit.*

The appellants contend that the provision of the Colorado Constitution, Article XX, which authorizes Denver to accept for annexation, from Jefferson County this property here involved, violates a Colorado Statute relating to school districts.[10]

Article IX, Section 2, of Colorado's Constitution requires the General Asembly to provide a uniform system of free public schools for the state. This Article was

[10] Acts of 1957, Chap. 123; Art. 25 439, Colo. Rev. Stats. 1953.

adopted by the people of Colorado in 1876. Article XX was added to the Constitution by the people of Colorado in 1902, and Section 7 thereof specifies that the City and County of Denver (created as a City and County by said Article XX) shall always constitute one school district.[11] Thus when adjoining land is annexed to Denver it becomes a part of the Denver School District. Section 8 of said Article XX also declares inapplicable to Denver any inconsistent or conflicting constitutional provisions.[12]

The appellants content that Article XX contravenes the school district organization act of 1957, Chapter 123, Article 25, Section 39, 1953 Colorado Revised Statutes, as amended, the general school statutes, in that the effect of Article XX is to exempt Denver from its provisions, and this, they claim, constitutes a taking of their property without due process of law, deprives them of equal protection of the laws under the Fourteenth Amendment and violates the Enabling Act of Colorado. Yet Section 7 of Article XX expressly provides that except as limited by the requirement that Denver shall always constitute one school district the general school laws of Colorado apply to it.[13]

Appellants deftly side step the time honored principle that the Constitution prevails over inconsistent statutory enactments. The Fourteenth Amendment is not infringed, merely because the People of Colorado declared in Article XX that Denver should always constitute one school district.

The contention that a state statute is superior to Constitutional provisions is, on its face, flagrantly lacking in substance.

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[11] See Jurisdictional Statement, Appendix B, at 53.
[12] Id. at 54.
[13] Id. at 53.

4. Automatic Altering of District Boundaries by the Annexation Does Not Violate the Equal Protection Clause.

Appellants further contend that Article XX of the Colorado Constitution grants to Denver the power to alter congressional, legislative and judicial district boundaries whenever it annexes a piece of land and this deprives them of equal protection of the laws. These are things, however, which the legislature and the state itself can do conditioned only upon the present statutory and constitutional provisions requiring these districts to conform to county lines. That these district boundaries are altered when land is detached from one county and added to another when Denver accepts a voluntary annexation petition, does not, as appellants contend, give Denver additional power not possessed by other counties. The fact that the district boundaries change, follows from acts of the legislature or of the Constitution itself, not from Denver's acceptance of an annexation request.

5. The Reapportionment Questions Now Pending Before Colorado and Federal Courts and Possible Legislation Are Not Involved In This Case.

For vague undefined reasons, appellants seek to inject *Baker* v. *Carr*, 369 U.S. 186, into this case but the voting rights of individuals involved there, and the question of annexation of part of a county to another city and county involved here, are entirely different. The property here was uninhabitated when the annexation petition was filed so no dilution of or increase in voting rights of any voter was affected. To put the facts into focus the status of reapportionment in Colorado will be reviewed briefly to demonstrate the irrelevance of reapportionment to the instant case.

Article V, Section 45, of the Colorado Constitution [14] requires the legislature to revise and adjust the apportionment for State senators and representatives on the basis of a census according to ratios to be fixed by law. The legislature last reapportioned itself in 1953, Chapter 63, Article 1, Section 1, 1953 Colorado Revised Statutes, as amended.

Subsequent to this Court's decision in *Baker* v. *Carr*, 369 U.S. 186, two cases were filed in Colorado, one an original proceeding in the Colorado Supreme Court, *Stein* v. *General Assembly*,[15] the other *Lisco* v. *McNichols as Governor*,[16] in the United States District Court for the District of Colorado, the object of both suits being to compel a reapportionment in Colorado. About the same time two initiated constitutional reapportionment matters were placed on the ballot in the November 1962 election.[17]

The Colorado Supreme Court took jurisdiction but concluded, in view of the pendency of the initiated amendments on the ballot, and since the Legislature had not had a plenary session since the last census results were certified to it in 1960, to wait until June 1, 1963, to take further action in the matter. The statutory federal court also declined temporary injunctive relief so as not to interfere with the orderly conduct of the election or the free expression by the electorate on the initiated amendments, but set a further hearing to take place after the general election had been held.

The voters did approve one of the initiated constitutional amendments [18] and the General Assembly must now re-

[14] Amendments to Article V of the Colorado Constitution were adopted by the electorate in the November 1962 election. See Appendix A, attached hereto.

[15] See Jurisdictional Statement, Appendix D.

[16] Id., Appendix E.

[17] See *supra* Note 14.

[18] See *supra* Note 14.

apportion itself according thereto within forty-five days after their 1963 session commences on January 2 or suffer the penalties therein provided.

The validity of this constitutional amendment has been challenged in a supplemental complaint filed with the same statutory federal court and a pretrial conference has been set for February.

The valid annexation herein is not in conflict with *Baker* v. *Carr.* When the legislature acts or fails to act and the two courts who are still considering the reapportionment problems hand down final decisions, it will be time then to consider the voting rights questions which are found to exist or not exist. Such rights are not involved here even by the greatest stretching of imagination.

In this connection the appellants ask this Court in this case to invalidate all the statutory laws of Colorado since the legislature last reapportioned itself in 1953. The Iowa Court refused to embark on that chaotic course and this Court sustained it in *City of Cedar Rapids* v. *Cox*, 252 Iowa 948, 108 N. W. 2d 253, 262 (1961), appeal dismissed, 368 U.S. 3.

6. *An Advisory Opinion On Future Annexation Legislation Will Not Be Given*

Appellants in their Sixth Question, want this Court to rule hypothetically that any annexation legislation which might be passed in the upcoming legislative session would likewise be invalid. This Court long ago declined to

> ". . . give advisory opinions which cannot affect the rights of the litigants in the case before it." *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U.S. 416, 418.

7. Questions Presented For The First Time In This Court Are Raised Too Late

In their Questions 1, 2 and 3 appellants for the first time now assert they have been denied due process of law by the annexation herein attacked. That such contentions are intertwined with their other assignments indicates appellants' lack of confidence in them. In any event, it is too late to raise them for the first time in this Court.

> "It does not appear, however, from the record that this constitutional question was presented in or passed upon by the Supreme Court of the State; and as it was sought to raise this question for the first time by assignments of error in this Court, it is necessarily excluded from our consideration." *White River Lumber Co.* v. *Arkansas*, 279 U.S. 692, 700. See also *Edelman* v. *California*, 344 U.S. 357.

Conclusion

For the reasons given above, the appeal should be dismissed or the decision of the Colorado Supreme Court should be affirmed as no substantial federal question is presented herein.

Respectfully submitted,

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APPENDIX A

AN ACT TO AMEND ARTICLE V OF THE STATE CONSTITUTION PROVIDING FOR THE APPORTIONMENT OF THE SENATE AND HOUSE OF REPRESENTATIVES OF THE GENERAL ASSEMBLY AND PROVIDING FOR SENATORIAL DISTRICTS AND REPRESENTATIVE DISTRICTS

SECTION 1. Section 45, 46, and 47 of Article V of the Constitution of the State of Colorado are hereby repealed and new Sections 45, 46, 47 and 48 of Article V are adopted, to read as follows:

Section 45. GENERAL ASSEMBLY. The general assembly shall consist of 39 members of the senate and 65 members of the house, one to be elected from each senatorial and representative district. Districts of the same house shall not overlap. All district shall be as compact as may be and shall consist of contiguous whole general election precincts. No part of one county shall be added to another county or part of another county in forming a district. When a district includes two or more counties they shall be contiguous.

Section 46. HOUSE OF REPRESENTATIVES. The state shall be divided into 65 representative districts which shall be as nearly equal in population as may be.

Section 47. SENATE. The state shall be divided into 39 senatorial districts. The apportionment of senators among the counties shall be the same as now provided by 63-1-3 of Colorado Revised Statutes 1953, which shall not be repealed or amended other than in numbering districts, except that the counties of Cheyenne, Elbert, Kiowa, Kit Carson and Lincoln shall form one district, and one additional senator is hereby apportioned to each of the counties of Adams; Arapahoe, Boulder and Jefferson. Within a county to which there is apportioned more than one senator, senatorial districts shall be as nearly equal in population as may be.

Section 48. REVISION OF DISTRICTS. At the regular session of the general assembly of 1963 and each regular session next following official publication of each Federal enumeration of the population of the state, the general assembly shall immediately alter and amend the boundaries

of all representative districts and of those senatorial districts within any county to which there is apportioned more than one senator to conform to the requirements of Sections 45, 46 and 47 of this Article V. After 45 days from the beginning of each such regular session, no member of the general assembly shall be entitled to or earn any compensation or receive any payments on account of salary or expenses, and the members of any general assembly shall be ineligible for election to succeed themselves in office, until such revisions have been made. Until the completion of the terms of the representatives elected at the general election held in November of 1962 shall have expired, the apportionment of senators and represenatives and the senatorial and representative districts of the general assembly shall be as provided by law.

The ballot title and submission clause to the proposed initiative amendment to the constitution petitioned for herein as designated and fixed by the Secretary of State, Attorney General and Reporter of the Supreme Court is as follows, to-wit:

AN ACT TO AMEND ARTICLE V OF THE STATE CONSTITUTION PROVIDING FOR A SENATE OF 39 MEMBERS AND A HOUSE OF 65 MEMBERS; PROVIDES FOR 65 REPRESENTATIVE DISTRICTS TO BE SUBSTANTIALLY EQUAL IN POPULATION; FOR SENATORIAL DISTRICTS APPORTIONING SENATORS AS NOW PROVIDED BY LAW, AND ONE ADDITIONAL SENATOR IS APPORTIONED TO ADAMS, ARAPAHOE, BOULDER AND JEFFERSON COUNTIES; ELBERT COUNTY BEING DETACHED FROM ARAPAHOE COUNTY AND ATTACHED TO A DISTRICT WITH ADJOINING COUNTIES; PROVIDES FOR SENATORIAL DISTRICTS OF SUBSTANTIALLY EQUAL POPULATION WITHIN COUNTIES WITH MORE THAN ONE SENATOR; FOR REVISION OF DISTRICTS BY THE GENERAL ASSEMBLY IN 1963 AND AFTER EACH DECENNIAL CENSUS THEREAFTER, UNDER PENALTY OF LOSS OF COMPENSATION AND ELIGIBILITY OF MEMBERS TO SUCCEED THEMSELVES IN OFFICE.